80-1068

No.

Supreme Court, U. S.
FILED
DEC 26 1980
MICHAEL RODAK, JR., CLERK

# SUPREME COURT OF THE UNITED STATES

October Term, 1980

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JEWISH HOSPITAL ASSOCIATION OF LOUISVILLE, KENTUCKY, INC. - - Petitioner

*versus*

STEWART MECHANICAL ENTERPRISES, INC., and
JAMES E. SMITH & SONS, INC., and
OTHER UNNAMED CONSPIRATORS - Respondents

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## PETITION FOR WRIT OF CERTIORARI TO REVIEW THE DECISION OF THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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IRWIN G. WATERMAN
ALAN N. LINKER
600 Marion E. Taylor Building
Louisville, Kentucky 40202
(502) 589-3200
*Attorneys for Petitioner*

WESTERFIELD-BONTE CO., 619 W. KENTUCKY—P.O. BOX 3251, LOUISVILLE, KY.

## QUESTIONS PRESENTED

1. Under *Illinois Brick* principles, does the direct buyer (general contractor), having knowledge or reason to have knowledge that its subcontractors conspired to fix prices on subcontract work, have a duty to the owner (indirect buyer) to disclose such pre-bid information or decline to deal with the price fixers, the violation of which duty renders the direct buyer a co-conspirator and joint tort feasor with the subcontractors?

2. Does a complaint against subcontractors sounding in the violation of the Sherman and Clayton Acts which states that "various firms, corporations, and individuals engaged in the business of providing mechanical contracting supplies and services in the Louisville market, not made Defendants in this action, participated as co-conspirators in the violations" also include general contractors as joint tort feasors and for purposes of alleging a vertical conspiracy?

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# SUPREME COURT OF THE UNITED STATES

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JEWISH HOSPITAL ASSOCIATION OF LOUISVILLE, KENTUCKY, INC. - - - - *Petitioner*

*v.*

STEWART MECHANICAL ENTERPRISES, INC., and JAMES E. SMITH & SONS, INC., and OTHER UNNAMED CONSPIRATORS - - *Respondents*

---

## PETITION FOR WRIT OF CERTIORARI TO REVIEW THE DECISION OF THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

---

Jewish Hospital Association of Louisville, Kentucky, Inc., petitions for a Writ of Certiorari to review the Judgment of the United States Court of Appeals for the Sixth Circuit.

## OPINIONS BELOW

The Opinion of the Court of Appeals (App. D, pp. 12a-25a) is reported under the style "Jewish Hospital Association of Louisville, Kentucky, Inc. v. Stewart Mechanical Enterprises, Inc., and James E. Smith & Sons, Inc.", 628 F. 2d 971 (6th Cir; August 29, 1980).

The Opinion of the District Court (App. A, pp. 1a-9a) is not known to be reported.

## JURISDICTION

The Judgment of the Court of Appeals (App. E, p. 26a) was entered August 29, 1980. The Order denying the timely Petition for Rehearing (App. F, p. 27a) was entered September 29, 1980. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

## STATUTES INVOLVED

The Sherman Act, Section 1, 15 USC § 1, provides:

"§ 1. Restraint of trade; penalty

Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is hereby declared to be illegal. Every person who shall make any contract or engage in any combination or conspiracy hereby declared to be illegal shall be deemed guilty of a felony, and, on conviction thereof, shall be punished by fine not exceeding one million dollars if a corporation or, if any other person, one hundred thousand dollars, or by imprisonment not exceeding three years, or by both said punishments, in the discretion of the court." (As amended Dec. 12, 1975, P. L. 94-145, § 2, 89 Stat. 801.)

The Clayton Act, Section 4, 15 USC § 15, provides:

"§ 15. Suits by persons injured; recovery of treble damages

Any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor in any district

court of the United States in the district in which the defendant resides or is found or has an agent, without respect to the amount in controversy, and shall recover threefold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee." (Oct. 15, 1914, c. 323, § 4, 38 Stat. 731.)

## STATEMENT

Jewish Hospital Association, Petitioner herein, initiated an action for treble damages against Stewart Mechanical Enterprises, Inc., James E. Smith & Sons, Inc., and Other Unnamed Conspirators in the United States District Court for the Western District of Kentucky alleging the Respondents conspired to fix the price of mechanical (plumbing, heating, air conditioning, and sheet metal) subcontract work on the 1970 Wheeler Addition to the Jewish Hospital. No discovery was taken in this action. After this action commenced, the Supreme Court rendered its decision in *Illinois Brick Company, et al.* v. *State of Illinois,* 431 U. S. 720, 97 S. Ct. 2061, 52 L. Ed. 2d 707 (June 9 1977), rehearing denied, 434 U. S. 881, 54 L. Ed. 2d 164, 98 S. Ct. 242 (1977). *Illinois Brick* holds that a direct purchaser only may maintain an action for damages under the mentioned statutes. On the basis of the *Illinois Brick* decision and discovery in a companion case filed by the Jewish Hospital Association against certain of the general contractors bidding the Wheeler Addition, the District Court sustained a Motion for Summary Judgment of the Respondents, Stewart

Mechanical and James E. Smith. The companion case styled "Jewish Hospital Association of Louisville, Kentucky, Inc. v. Struck, Inc., et al." is still pending in the District Court.

Petitioner herein appealed the decision of the District Court to the Sixth Circuit. Respondents herein filed a Cross-Appeal on an issue of limitations which was decided in the Jewish Hospital Association's favor in the District Court. The Sixth Circuit affirmed the Judgment of the United States District Court on the *Illinois Brick* issue and did not decide the limitations issue.

The Opinion of the Sixth Circuit contains a statement of the case based on the Record on Appeal. This statement is acceptable to Petitioner. In the interest of brevity and accuracy, the Court is respectfully referred to that portion of the Opinion of the Sixth Circuit contained in the Appendix to this Petition.

The Sixth Circuit decided three *Illinois Brick* exceptions against the Petitioner, the controlled purchase/seller issue, a pre-existing cost-plus contract issue, and a vertical conspiracy issue. Petitioner believes that the Sixth Circuit erred on all three points. However, this Petition is limited to the vertical conspiracy issue which is covered in Section II C of the Sixth Circuit's Opinion, pp. 24a to 25a of the Appendix.

The vertical conspiracy issue was raised in the District Court by a Motion to Consolidate the action against the mechanical subcontractors with the companion action against the general contractors. This

Motion was filed after Respondents herein filed their Motion for Summary Judgment based on *Illinois Brick*. The Motion to Consolidate stated that the architects on the project published a list of nine mechanical contractors approved to bid, that Stewart Mechanical and James E. Smith were the only mechanical contractors which submitted bids to any general contractors bidding the project, that the mechanical work constituted approximately one-third of the project, that the general contractors submitted bids on the project which included amounts for mechanical subcontract work, alleged to be determined without sufficient competition and of a collusive nature, and that the general contractors having knowledge or having reason to know there was insufficient competition for the mechanical work thereby participated in the alleged wrongful actions of the mechanical subcontractors. The District Court overruled the Motion to Consolidate.

On appeal to the Sixth Circuit the Petitioner herein raised an issue based on a vertical conspiracy between the general contractors and the mechanical subcontractors, which vertical conspiracy, if proven, would make the general contractors and mechanical subcontractors direct sellers of the price fixed items. The Sixth Circuit held that this argument was not sustainable under the pleadings since there was no vertical conspiracy alleged as such. The Court stated that the separate Complaints each stated horizontal conspiracies.

The pleading in the mechanical contractors' case states as follows:

"III. CO-CONSPIRATORS

6. Various firms, corporations, and individuals engaged in the business of providing mechanical contracting supplies and services in the Louisville market, not made Defendants in this action, participated as co-conspirators in the violations hereinafter charged and performed acts and made statements in furtherance thereof."

The pleading in the general contractors' case states as follows:

"1.6 UNNAMED CO-CONSPIRATORS.

Upon information and belief, other persons, firms, corporations and/or entities (hereinafter 'Unnamed Co-Conspirators') presently unknown to Plaintiff, participated with the named Defendants in the illegal acts and practices hereinafter set forth and the Plaintiff hereby requests leave of Court to amend this pleading when the identity of such Co-Conspirators be ascertained by the Plaintiff, in the course of discovery herein."

The Petitioner filed a Petition for Rehearing in the Sixth Circuit, pointing out to the Sixth Circuit that the pleading in the mechanical contractors' case, the within Appeal, alleges conspiracy between the Respondents named in the case and unnamed co-conspirators who are "providers" of mechanical contract services. The general contractors were "providers" of the mechanical contract services. Thus, the pleadings and Motion to Consolidate covered the issue raised on appeal. See *Gas-a-Tron of Arizona* v. *American Oil*

*Co.*, 1977-2 CCH Trade Cases ¶ 61,789 (D.C. Ariz.; 1977).

It is believed that the issue raised by this Petition *infra* is important to the development in the law of the private enforcement of anti-trust claims and a necessary implementation of the *Illinois Brick* decision.

## REASONS FOR GRANTING THE WRIT

The issue raised below and by this Petition is as follows:

Does a general contractor, direct buyer, having knowledge or reason to have knowledge that subcontractors conspired to fix prices on subcontract work, have a pre-bid duty to the owner to disclose such knowledge or to act against its subcontractors, the violation of which duty renders the general contractor and subcontractors co-conspirators and joint tort feasors?

The declared purpose of this Court in *Illinois Brick* is the implementation of private enforcement of the anti-trust statutes. Considering the astonishing volume of anti-trust litigation reflected in reported decisions, there is a high incidence of anti-competitive activity in the business world. The duty on each participant in the business world is not limited to its avoidance of anti-competitive activity. Members of the business world have a duty to their customers not to knowingly pass on rigged prices on peril of becoming a party to the wrongful act. This requirement of vigilance of all participants in a contracting trans-

action will enhance voluntary compliance with the anti-trust laws.

On the issue of the pleadings, it is submitted that the general contractors were "providers" of mechanical contract services and included in the alleged "unnamed co-conspirators." If these general contractors were not named parties to the within action, they were by their breach of duty joint tort feasors with the named Defendants. The pleadings covered the issue without resort to the rule of liberal construction. It is well settled that a plaintiff may sue any one or more of the joint tort feasors in an anti-trust claim. See *Leh* v. *General Petroleum Corp.,* 382 U. S. 54, 86 St. Ct. 203, 15 L. Ed. 2d 134. On Petition for Rehearing in the Sixth Circuit, the Petitioner directed that Court's attention to the pleadings and to the right of the Hospital to sue one or more joint tort feasors. Nevertheless, the Sixth Circuit left intact its Opinion which stated that the pleadings did not cover the issue. It is submitted that the Sixth Circuit should not have left intact an opinion which indicated error in pleading on the part of the Hospital.

## CONCLUSION

It is believed that this Petition, if granted, will present to the Court a principle which will afford indirect buyers the protection which will result from the enunciation of a duty of vigilance on the direct buyer, or, in the alternative, a duty not to knowingly pass on an illegally fixed price.

Respectfully submitted,

IRWIN G. WATERMAN
ALAN N. LINKER
600 Marion E. Taylor Building
Louisville, Kentucky 40202
(502) 589-3200

*Attorneys for Petitioner*

# APPENDIX

## APPENDIX A

IN THE

# UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF KENTUCKY
AT LOUISVILLE

**Civil Action No. C 76-0430 L(A)**

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JEWISH HOSPITAL ASSOCIATION OF LOUISVILLE, KENTUCKY, INC., - - - - - - *Plaintiff,*

*v.*

STEWART MECHANICAL ENTERPRISES, INC., Et Al., - - - - - - - - - *Defendants.*

---

**MEMORANDUM OPINION**—Entered May 4, 1978

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This antitrust action is submitted to the Court on the motions of the defendants for summary judgment, based primarily on the ruling of the Supreme Court in *Illinois Brick Company* v. *Illinois,* 431 U. S. 720 (1977) and on the alleged running of the statute of limitations.

The undisputed evidence, as developed by discovery and by the pleadings, reflects that on May 24, 1970, the plaintiff received bids from general contractors with respect to plans and specifications for additions to the Jewish Hospital. On June 24, 1970, an agreement was reached between the general contractor and the plaintiff for the construction, with the work to be completed within 930 days.

On May 22, 1972, defendant James E. Smith and Sons, Inc. was indicted for antitrust violations in this Court, Criminal Action No. 27837, but defendant Stewart Mechan-

ical Enterprises, Inc. was not indicted. A civil action was also filed by the United States against defendant James E. Smith and Sons, Inc. on the same date as the indictment was returned. Again, Stewart Mechanical Enterprises, Inc. was not named as a defendant.

On September 27, 1972, a bill of particulars was filed by the United States in the action against James E. Smith and Sons, Inc. and others not mentioning the Jewish Hospital project. Stewart Mechanical was named as a co-conspirator in the bill of particulars. On February 16, 1973, James E. Smith and Sons, Inc. were sentenced in the criminal action pursuant to their *nolo contendre* plea, and on September 13, 1973, final judgment was entered against Smith and Sons in the civil action.

Criminal indictments were returned against Patrick M. King and George F. Duthie, Vice President and President of Stewart Mechanical, alleging perjury in their testimony before the Grand Jury, which returned the indictment against James E. Smith and Sons, Inc. and others, entitled *United States of America* v. *Clark Mechanical Enterprises, et al,* Criminal Action No. 27837. The transcript of proceedings in *United States of America* v. *Patrick M. King,* No. CR 28264, Volume 4(a), pp. 654-655, contained a brief reference to the complementary bidding on the Jewish Hospital project. King and Duthie were both acquitted by jury verdicts, the first verdict being on July 26, 1974 and the second one on May 1, 1975.

Plaintiff paid the general contractor its final payment of $708,619.55 on August 7, 1974.

On November 18, 1975, a criminal indictment was returned against Stewart Mechanical, No. CR 75-0265L, and a civil antitrust action was filed by the Government against the same defendant, No. 75-0377L(A). Two days later a civil antitrust action and a criminal antitrust action were filed by the United States against general contractors, in-

cluding defendants Whittenberg Engineering and Construction Company, Inc. and Struck, Inc., bidders on the Jewish Hospital project.

On March 8, 1976, the United States filed a proposed bill of particulars in the criminal antitrust action against Stewart describing unlawful conduct by it and listing as unlawful activity the Jewish Hospital project of May, 1970, with the known bidders stated to be James E. Smith and Sons, Inc. and Stewart Mechanical. Also, on that date, the United States alleged that James E. Smith and Sons had participated in offenses charged in the indictment.

On March 8, 1976, a proposed bill of particulars was filed by the United States in its criminal action against the general contractors describing unlawful bidding practices and listing as a bid situation evidencing such activity the Jewish Hospital project, with the known bidders stated to be Struck, Inc., Whittenberg Engineering, Glenroy Construction Company and F. A. Wilhelm Construction. On September 24, 1976, plaintiff filed its action against the general contractors and on September 27, 1976 filed this action.

With regard to the statute of limitations question, the parties are in agreement that a plaintiff in a civil antitrust case must bring his action within four years after the cause of action accrued, 15 U.S.C. Sec. 15(b), plus any additional years during which the statute of limitations is tolled. See *Zenith Radio Corporation* v. *Hazeltine Research, Inc.* 401 U. S. 321 (1971). As pointed out in *Zenith,* "a cause of action accrues and the statute begins to run when a defendant commits an act that injures a plaintiff's business." See 401 U. S. at p. 338. However, "in the context of a continuing conspiracy to violate the antitrust laws, . . . this has usually been understood to mean that each time a plaintiff is injured by an act of the defendants a cause of action accrues to him to recover the damages caused by

that act and that, as to those damages, the statute of limitations runs from the commission of the act." See p. 338.

The parties are also in agreement that 15 U.S.C. Sec. 16(b) provides for the tolling of the statute of limitations during the period as to which there is pending a suit, either criminal or civil in nature, either by the United States or a private party, against the defendant. See *Zenith, supra,* at p. 335. The parties, however, disagree as to the proper applicability of these sections to the undisputed facts.

*Zenith, supra,* further holds that Section 16(b) tolls the statute of limitations against all participants in a conspiracy which is the subject of a government suit whether or not they are named as defendants or conspirators. See 401 U. S. at p. 336.

It is apparent that, as to James E. Smith and Sons, Inc., the statute of limitations was tolled during the period May 22, 1972 to September 13, 1973, inasmuch as there was pending during that period a civil antitrust case by the United States against that defendant. It is obvious, also, that the statute was tolled as to Stewart Mechanical during the period May 22, 1972 until February 16, 1973, during which there was pending the criminal action against defendant James E. Smith and Sons, Inc., during the course of which Stewart Mechanical was named as a coconspirator in the bill of particulars.

If we accept the argument made by the defendants that all injuries occurred to the plaintiff on or before June 24, 1970, the date when the general contractor entered into the contract with the plaintiff, then plaintiff would have had a period of four years from that date within which to bring suit, plus the period of approximately sixteen months as to James E. Smith and Sons, Inc., and a period of approximately nine months as to Stewart Mechanical, Inc. It is apparent, as a matter of mathematical calculation that the right to bring an action against James E. Smith and Sons,

Inc. would then have expired in October, 1975, and as against Stewart Mechanical would have expired in March, 1975. However, we do not accept defendants' arguments that the damages accrued to plaintiff as of June 24, 1970 and that no overt act was committed after that date. We believe that each submission of payment by defendants in connection with the Jewish Hospital bid constituted an overt act, and that the right of the plaintiff to establish damages became fixed and certain as of the date that such payments were made.

As stated in *Zenith, supra,* at p. 339:

> "Thus, if a plaintiff feels the adverse impact of an antitrust conspiracy on a particular date, a cause of action immediately accrues to him to recover all damages incurred by that date and all provable damages that will flow in the future from the acts of the conspirators on that date. . . . On the other hand, it is hornbook law, in antitrust actions as in others, that even if injury and a cause of action have accrued as of a certain date, future damages that might arise from the conduct sued on are unrecoverable if the fact of their accrual is speculative or their amount and nature unprovable." (Citing cases).

We do not agree with plaintiff that the indictments against King and Duthie, who were officers of Stewart Mechanical, should be considered as tolling the statute, since those indictments were concerned with perjury and not with violations of the antitrust laws.

Plaintiff insists that the statute of limitation is no bar to its claims in this action, because plaintiff was not aware of its right to sue the defendant until September 27, 1972, when the bill of particulars was filed, which designated Stewart Mechanical as an unindicted coconspirator in the

price-fixing activities occurring in the Falls City area. Defendants, on the other hand, contend that plaintiff should have discovered, well in advance of the filing of the bill of particulars and even in advance of the return of the indictment against James E. Smith and Sons, Inc. in March, 1972, that the defendants were conspiring to fix prices. This argument is based on the theory that since the bids for construction of the addition were 31% in excess of the amounts of the estimated cost of construction, that plaintiff was then put on notice that there might exist a conspiracy to fix prices.

The rule as to the tolling of statutes of limitations in the Sixth Circuit because of fraudulent concealment is found in the case of *Akron Presform Mold Company* v. *McNeil Corporation,* 496 F. 2d 230 (1974). The rule is that there must be ignorance on the part of the plaintiff of one's rights and due diligence in discovering the fraud. See footnote 5, p. 234. Also, it has been held that concealment by the defendant only by silence is not enough, but he must be guilty of some trick or contrivance tending to exclude suspicion and prevent inquiry. See *Arkansas Natural Gas Company* v. *Sartor,* 78 F. 2d 924, 928 (5th Cir. 1935), reaffirmed in *Hickok Producing & Development Company* v. *Texas Company,* 128 F. 2d 183 (5th Cir. 1942).

In the instant case, it is not shown as a matter of law that plaintiff knew of the price-fixing with regard to the project which is the subject of this action, even after the filing of the bill of particulars, although at that time, plaintiff became aware that Stewart Mechanical was named as a coconspirator.

With regard to defendants' argument that it did not fraudulently conceal their price-fixing activities, there is no merit to such contention. Price-fixing is an illegal activity which subjects participants in it to treble damages in civil suits and to criminal penalties, including imprison-

ment up to one year for the participants who are found guilty. Under no stretch of the imagination could it be held that defendants did not fraudulently conceal the nature of their price-fixing activities.

Finally, with respect to the question of due diligence on the part of plaintiff, this is a question of fact. The Court will not rule, as a matter of law, that plaintiff's claim that the statute of limitations is tolled by the fraudulent concealment of the cause of action by defendants should have been discovered prior to September 27, 1972.

The Court has gone into considerable detail in analyzing the statute of limitations problems inherent in this case, even though it is of the opinion that defendants are entitled to summary judgment on other grounds, so as to have presented for the appellate court a full analysis of the limitations problems.

Although plaintiff, under the above reasoning, would be entitled to show any damages suffered by it which accrued within four years after payments are made with relation to the work done and materials supplied by the defendants, the motion for summary judgment must be granted on the basis of the opinion in *Illinois Brick Company* v. *Illinois, supra.* In that case, the Supreme Court, in a six to three decision, held that the State of Illinois and 700 local governmental entities which had entered into construction projects, could not recover antitrust treble damages from masonry contractors who manufacture and sell concrete blocks to masonry contractors who submit bids to general contractors for the masonry portions of construction projects. In reaching that decision, Mr. Justice White, writing for the majority, declined to abandon the principles set out in *Hanover Shoe, Inc.* v. *United Shoe Machinery Corporation,* 392 U. S. 481 (1968) to the effect that the overcharged direct purchaser, and not others in the chain of manufacture or distribution, is the party entitled to recover

damages if injured in his business or property within the meaning of 15 U.S.C. Sec. 15. See *Illinois Brick Company* v. *Illinois, supra,* at p. 729.

In the instant case, the plaintiff is in the same position as the State of Illinois and the 700 local governmental entities were in *Illinois Brick Company, supra.* Its contract is with the general contractor, Wilhelm Construction, and not with the defendants in this action. Its cause of action, under *Illinois Brick,* therefore, is against the general contractor, and not against the mechanical contractor. This is true even though plaintiff approved the list of potential sub-bidders for the general contractor, and even though there is a potential for vertical price-fixing as between general contractors and mechanical contractors.

Cases decided since *Illinois Brick Company, supra,* have uniformly granted summary judgments in cases where plaintiffs were indirect purchasers of either supplies, manufactured goods, or supplies and labor. See *Jackson Park Development Corp.* v. *Bradley Supply Co.,* No. 76-C-4322 (N.D. Ill. June 17, 1977); *Royal Printing Co.* v. *Kimberly-Clark Corp.,* No. C 77-0225-SC (N.D. Cal. July 22, 1977); *In Re Toilet Seat Antitrust Litigation,* Master File No. 75-184 (E.D. Mich. August 24, 1977); *In Re Sugar Antitrust Litigation,* (East Coast), MDL No. 201A (E.D. Pa. September 29, 1977).

Finally, the Court may no longer defer action on the motion for summary judgment because of proposed legislation pending in Congress which is designed if enacted to overcome the effect of the Supreme Court decision in *Illinois Brick Company, supra.* This legislation was introduced July 15, 1977 but is still in Committee.

When the Supreme Court has established a rule of law governing a particular case, the courts are not permitted to delay a decision pending a possible change in the law. See *Federal Deposit Ins. Corporation v. Alker,* 169 F. 2d

336 (3rd Cir. 1948), cert. denied, 336 U. S. 953 (1949), and *In Re Toilet Seat Antitrust Litigation, supra.*

We have this day entered summary judgment for defendants.

Dated 5/4/78

/s/ Charles M. Allen
United States District Judge

cc: Counsel of Record

## APPENDIX B

**SUMMARY JUDGMENT**—Entered May 4, 1978

Defendants, having filed motions for summary judgment, and the Court, having entered its memorandum opinion and being fully advised in the premises,

IT IS ORDERED AND ADJUDGED that defendant's motions for summary judgment be and they are hereby sustained.

This is a final and appealable judgment and there is no just cause for delay.

Dated 5/4/78

/s/ Charles M. Allen
United States District Judge

cc: Counsel of Record

## APPENDIX C

**SUPPLEMENTAL ORDER**—Entered May 25, 1978

The Court, having noted that its original opinion did not clearly rule on the motion of defendants for summary judgment, insofar as it related to the question of the action being time-barred,

NOW, THEREFORE, IT IS ORDERED that said opinion is supplemented to state on page 6 thereof, after the words September 27, 1972 "in conclusion, we hold that the complaint was timely filed and defendants' motion for summary judgment, based on the alleged running of the statute of limitations, is denied."

Dated May 25, 1978

/s/ Charles M. Allen
United States District Judge

cc: Counsel of Record

## APPENDIX D

**No. 78-3373-74**

# UNITED STATES COURT OF APPEALS

**FOR THE SIXTH CIRCUIT**

---

JEWISH HOSPITAL ASSOCIATION OF LOUISVILLE, KENTUCKY, INC., - *Plaintiff-Appellant, Cross-Appellee,*

*v.*

STEWART MECHANICAL ENTERPRISES, INC., and JAMES E. SMITH & SONS, INC., - - - - - - *Defendants-Appellees, Cross-Appellants.*

---

*Appeal from the United States District Court for the Western District of Kentucky*

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Decided and Filed August 29, 1980.

Before: KENNEDY and JONES, Circuit Judges, and PHILLIPS, Senior Circuit Judge.

PHILLIPS, Senior Circuit Judge. Plaintiff Jewish Hospital Association of Louisville, Kentucky, Inc. (the Hospital) filed this treble damage antitrust action under §§ 4 and 12 of the Clayton Act, 15 U.S.C. §§ 15 and 22, alleging the defendants, Stewart Mechanical Enterprises, Inc. (Stewart) and James E. Smith & Sons, Inc. (Smith), conspired to fix the price of mechanical (plumbing, heating, air-conditioning and sheet metal) work on the 1970 Wheeler Addition to the Jewish Hospital. Chief District Judge

Charles M. Allen granted summary judgment for the defendants on the ground the suit is barred by the indirect-purchaser doctrine of *Illinois Brick Co.* v. *Illinois,* 431 U. S. 720 (1977). The Hospital appeals. Stewart and Smith have cross-appealed from Judge Allen's refusal to hold the suit barred by the Clayton Act's four years statute of limitations, 15 U.S.C. § 15b. Because we hold the *Illinois Brick* rule bars the suit, we affirm without reaching the statute of limitations question.

I

In 1970, the Hospital solicited bids from general contractors for the construction of the Wheeler Addition. As required by the bidding procedure, interested general contractors submitted lists of subcontractors from whom they proposed to solicit bids. Joseph & Joseph, the architects, approved nine mechanical subcontractors they considered reputable, including Stewart and Smith, the defendants in this suit.

Five general contractors submitted bids on the project. The low bidder was Wilhelm Construction Company of Indianapolis, Indiana (Wilhelm or the general contractor). Wilhelm's bid of $11,487,844 exceeded the architects' pre-bid estimate by more than $2.3 million, or about 30 percent. Some $3 million of the total bid represented Stewart's low bid on the mechanical subcontract work, a figure about 25 percent above the pre-bid estimate.

In June 1970, Wilhelm was awarded the general contract, subcontracted with Stewart, and began construction of the Wheeler Addition. Construction was completed and the final progress payment was made in August 1974.

In May 1972, Smith and various other mechanical contractors were indicted for price-fixing in the Louisville area. Stewart was named an unindicted co-conspirator. At the

same time, the Government filed a civil action against the criminal defendants. Defendants pleaded *nolo contendere* in the criminal action and entered into a consent decree in the civil action. Smith was sentenced in the criminal case on February 16, 1973 and final judgment was entered in the civil case on September 13, 1973.

On November 18, 1975 the Government filed concurrent civil and criminal price-fixing actions against Stewart, which had been named a co-conspirator but not a defendant in the Government's prior actions against Smith. Two days later, the Government filed similar price-fixing actions against various general contractors, including several that had bid on the Hospital addition. On March 8, 1976 the Government filed bills of particulars in both criminal actions alleging, inter alia, the defendants had engaged in bid-rigging in connection with the Jewish Hospital project. Stewart pleaded *nolo contendere* on August 31, 1977.

Based on the information contained in the Government's complaints and bills of particulars, the Hospital filed two treble damage actions in September 1976 under §§ 4 and 12 of the Clayton Act, 15 U.S.C. §§ 15 and 22. In *Jewish Hospital Association of Louisville, Kentucky, Inc.* v. *Struck*, No. C-76-0426-L(4) (W.D. Ky.), the Hospital alleged a horizontal conspiracy among various named and unnamed general contractors, including Wilhelm, the successful bidder, to fix prices for the general contracting work on the Wheeler Addition. In the second of the two actions, the case at bar, the Hospital alleged a separate horizontal conspiracy between Stewart and Smith to fix the price of the mechanical subcontracting work on the Addition.

Stewart and Smith answered, denying liability and claiming the suit is barred by the Clayton Act's four-year statute of limitations, 15 U.S.C. § 15b. Subsequently, on July 6, 1977, the defendants moved for summary judgment

on the additional ground the suit is barred by the indirect-purchaser doctrine of *Illinois Brick Co.* v. *Illinois, supra.*

The Hospital responded by arguing the statute of limitations does not bar the action because the defendants fraudulently had concealed their price-fixing. Furthermore, the Hospital argued, the case falls within an exception to the *Illinois Brick* rule. Finally, the Hospital moved to consolidate the action against the general contractors with the case at bar on the ground the general contractors who knew or should have known there was insufficient competition among the mechanical subcontractors became parties to the subcontractors' antitrust violation. The defendants in both cases opposed this motion, and the district court refused to consolidate.

After deferring any ruling on the *Illinois Brick* motion until it became clear that then pending legislation[1] to overrule that case would not become law, the court granted summary judgment for the defendants. The court found the Hospital had contracted for the construction of the Wheeler Addition with Wilhelm which, in turn, had bought all mechanical work from Stewart. This two tier relationship makes the case analogous to *Illinois Brick,* the district court held, and the indirect-purchaser doctrine therefore bars the suit. The court also discussed the statute of limitations issue, but denied summary judgment on the ground that the undisputed facts do not show the suit is time-barred.

The Hospital appeals from the summary judgment for the defendants on the *Illinois Brick* ground. The defendants cross-appeal from the court's refusal to grant summary judgment on the statute of limitations ground.

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[1]*See* S. 1874, 95th Cong., 2d Sess. (June 14, 1978); H.R. 11942, 95th Cong., 2d Sess. (August 11, 1978).

## II

In *Illinois Brick,* the State of Illinois and some 700 local governmental entities sued concrete block manufacturers for price-fixing. The plaintiffs argued masonry contractors had paid the artificially inflated price, incorporated the blocks into subcontracted masonry work on public buildings, and passed on the overcharge to general contractors who, in turn, had passed it on to the plaintiffs. Relying on the Supreme Court's earlier rejection of the passing-on defense in *Hanover Shoe Inc.* v. *United Shoe Machinery Corp.,* 392 U. S. 481 (1968), the district court held the plaintiffs could not use a passing-on theory affirmatively to establish damages, and granted partial summary judgment for the defendants. The Seventh Circuit reversed, holding the plaintiffs could recover if they could prove the illegal overcharge had been passed on to them by the direct and intermediate purchasers. The Supreme Court reversed the Seventh Circuit's decision, holding that only the direct purchasers, the masonry contractors, could sue for treble damages under § 4 of the Clayton Act.

The Court articulated two basic reasons for extending the *Hanover Shoe* ban on defensive use of passing-on to cases where indirect purchasers seek to use the pass-on argument offensively to establish damages. First the Court decided it is more efficient to limit damage recoveries under the Clayton Act to direct purchasers of the price-fixed product than to spread that recovery among all the purchasers in the chain of distribution. Under *Hanover Shoe* the brick manufacturers could not assert a passing-on defense against the masonry contractors. Allowing indirect purchaser-plaintiffs to argue that the illegal overcharge had been passed through to them would subject the defendants to the risk of multiple liability. Only by joining all potential plaintiffs as parties to the suit could the multiple liability problem

be eliminated. However, joining all potential plaintiffs would prove difficult or impossible in many cases, particularly where the price-fixed product had been incorporated into consumer goods. Moreover, joining all direct and indirect purchasers in a single suit would transform antitrust actions into massive damage apportionment proceedings whose complexity would increase the overall cost of litigation, diffuse the benefits of bringing a treble damage action, and thereby reduce the incentive to sue. 431 U. S. at 745. Given the longstanding policy of encouraging vigorous private enforcement of the antitrust laws, the Court opted for concentrating the full treble damage recovery at the direct purchaser level.

Second, and more important, determining how much of the overcharge actually had been passed through at each level would be nearly impossible. Even under the simplifying assumptions of economic theory, calculating the amount of the pass-through at any level would involve resolving conflicting expert opinions as to the elasticity of demand for the particular product. Furthermore, because pricing decisions in the real world of imperfectly competitive markets often do not fit an economist's model, theoretical calculations of the amount passed through would only approximate reality. Compounded by the need to repeat the calculations at each level in the chain of distribution, the difficulties and uncertainties of proof would make treble damage actions too complex to be either manageable or effective enforcement mechanisms. Accordingly, the Court held only direct purchasers of price-fixing products may recover in treble damage actions under the Clayton Act.

On its face, *Illinois Brick* seems to bar the Hospital's suit. The price allegedly fixed was the price of the mechanical subcontracting work. The direct purchaser of that work was the general contractor, not the Hospital. Only after the general contractor had incorporated the mechan-

ical work into the finished Wheeler Addition was it resold to the Hospital. To prevail against the defendants, the Hospital would have to prove what portion of the illegal overcharge the general contractor passed on in the form of a higher price for the completed building. *Illinois Brick* seems to prohibit such proof.

The Hospital argues, however, that its suit falls within several exceptions to the *Illinois Brick* rule. First, the Hospital says, the direct purchaser (Wilhelm) was controlled, either by the indirect purchaser (the Hospital) or by the seller (the defendants), so that market forces were superseded and the buyer-seller relationship between the defendants and Hospital effectively was direct. *See Illinois Brick Co.* v. *Illinois, supra,* 431 U. S. at 736 n. 16. Second, since the general contractor purportedly added a fixed percentage markup to the subcontractors' bids, the Hospital argues that its relationship with the general contractor was the functional equivalent of a pre-existing cost-plus contract, another exception to the passing on rule. *See Hanover Shoe, Inc.* v. *United Shoe Machinery Corp., supra,* 392 U. S. at 494. Finally, the Hospital urges there was a vertical conspiracy involving both the defendants and the general contractors, a situation some courts have found outside the rationale of the indirect-purchaser rule. *See, e.g., Florida Power Corp* v. *Granlund,* 78 F.R.D. 441 (M.D. Fla. 1978). In our view, none of these exceptions applies to this case.

A

The Hospital's first argument takes two alternative forms. As one possibility, the Hospital argues the general contractor was controlled by the defendants. According to the Hospital, it was irrelevant to the defendant mechanical contractors which general contractor was awarded the

Wheeler Addition contract. Stewart and Smith were the only mechanical contractors who bid, and they allegedly conspired to fix their prices. The various general contractors thus were mere conduits for the illegal overcharge, and this fact supposedly brings the case within the rationale of the "control" exception. Alternatively, the plaintiff argues the general contractor was controlled by the Hospital, which found it useful to purchase subcontracting services through an agent rather than directly. According to this argument, the general contractor's task was not to deliver a completed building but to assemble a package of goods and services for the Hospital.

Neither of these theories brings the present case within the rationale of the "control" exception. As examples of situations where an ownership or control relationship between an indirect purchaser and a direct purchaser might make the passing-on bar inapplicable, the *Illinois Brick* Court cited *Perkins* v. *Standard Oil Co.*, 395 U. S. 642, 648 (1969) and *In re Western Liquid Asphalt Cases*, 487 F. 2d 191, 199 (9th Cir. 1973), *cert. denied*, 415 U. S. 919 (1974). In *Perkins*, the Court held the defendant could not avoid liability under the Robinson-Patman Act for price discrimination merely by channelling the illegal discount through its 60 percent-owned subsidiary. In *Western Liquid Asphalt* there was evidence that the defendants controlled their direct customers either by acquiring their stock or by arranging to finance their purchases. Mindful of the *Illinois Brick* Court's emphasis upon the narrow scope of exemptions to the indirect-purchaser rule, 431 U. S. at 745, we read these citations as evidenced that the "control" exception is limited to relationships involving such functional economic or other unity between the direct purchaser and either the defendant or the indirect purchaser that there effectively has been only one sale. *See In re Beef Industry Antitrust Litigation*, 600 F. 2d 1148, 1162 (5th Cir. 1979).

In the present case, the Hospital has alleged no such functional unity. Even if the defendants submitted rigged bids to all the general contractors and were indifferent which one was awarded the contract, this fact does nothing to convert the two-step transaction into the equivalent of a single sale. Compare *In re Sugar Industry Antitrust Litigation,* 579 F. 2d 13, 18 (3d Cir. 1978) in which the court found no *Illinois Brick* problem where manufacturers allegedly fixed the price of sugar which their subsidiaries incorporated into candy purchased by the plaintiffs. *See also Obron* v. *Union Camp Corporation,* 477 F. 2d 542 (6th Cir. 1973), a case in which this court permitted the defendant to assert a passing-on defense against the plaintiff who had sold the defendant's allegedly price-fixed product under what amounted to a commission arrangement. Nor does it help the Hospital to argue the general contractor merely procured services rather than constructed the building. Wilhelms's "package of services" was one of five such "packages" offered to the Hospital. Wilhelm was selected because the overall price of its "package" was lowest. This is a far cry from situations where a purchaser employs an independent broker or purchasing agent to procure a particular good or service. *E.g., In re Toilet Seat Antitrust Litigation,* 1977-2 Trade Cas. ¶61,601 (E.D. Mich. 1977). Neither of the Hospital's theories suggests market forces were superseded. Problems of proving the amount of the pass-on remain undiminished. Accordingly, the "control" exception to the *Illinois Brick* rule does not save this action.

B

The Hospital's second argument is that its relationship with the general contractor was the functional equivalent of a pre-existing cost-plus contract which allowed the general contractor to pass on the full amount of the illegal over-

charge without any loss of sales volume. Specifically, the Hospital says, the general contractor merely solicited bids from subcontractors, added a fixed percentage markup to each, and submitted the total figure as its bid on the Wheeler Addition. Since the general contractor did not have to enter into contracts with the subcontractors until it was awarded the Wheeler Addition contract, the general contractor had nothing to lose by including the entire amount of the overcharge in its bid. By accepting the bid, the Hospital committed itself to buy the entire package, which included the full amount of the illegal overcharge. Accordingly, the Hospital says, the arrangement was the equivalent of a cost-plus contract.

Pre-existing cost-plus contracts are outside the rationale of the passing-on bar. As the Supreme Court recognized in *Illinois Brick:*

> In such a situation, the purchaser is insulated from any decease in its sales as a result of attempting to pass on the overcharge, because its customer is committed to buying a fixed quantity regardless of price. The effect of the overcharge is essentially determined in advance, without reference to the interaction of supply and demand that complicates the determination in the general case. 431 U. S. at 736.

In other words, because passing on the entire amount of the overcharge cannot decrease its sales, the direct purchaser has no incentive to absorb any of the overcharge itself. This being so, the problem of tracing the overcharge to the indirect purchaser is eliminated.

The Hospital's relationship with the general contractor, however, lacks the essential characteristic of pre-existence that removes the contractor's incentive to absorb part or all of the overcharge. Wilhelm presumably hoped to secure

the general contract on the Wheeler Addition. To do so, it had to submit the lowest bid. Given the need to submit the lowest bid, Wilhelm may have responded to the defendants' unexpectedly high bids on the mechanical work by reducing its profit margin or by taking steps to cut its overall costs. The courts have no way of ascertaining precisely how the general contractor reacted to the defendants' alleged pricefixing. This is exactly the type of uncertainty that caused the Supreme Court to reject a similar passing-on argument in *Illinois Brick:*

> An exception for the contractors here on the ground that they purport to charge a fixed percentage above their costs would substantially erode the *Hanover Shoe* rule without justification. Firms in many sectors of the economy rely to an extent on cost-based rules of thumb in setting prices. See F. Scherer, Industrial Market Structure and Economic Performance 173-179 (1970). These rules are not adhered to rigidly, however; the extent of the markup (or the allocation of costs) is varied to reflect demand conditions. *Id.*, at 176-177. The intricacies of tracing the effect of an overcharge on the purchaser's prices, costs, sales, and profits thus are not spared the litigants. 431 U. S. at 744.

Similarly, we find no basis in this case for treating the relationship between the Hospital and the general contractor as an exception to the rule of *Illinois Brick.*

*In re Beef Industry Antitrust Litigation, supra,* 600 F. 2d at 1164-66, on which the Hospital relies heavily, is not to the contrary. In that case, cattle producers sued supermarket chains for artificially depressing wholesale beef prices by agreeing not to pay more than a fixed price. Because the chains have extensive cold storage facilities and processors do not, the chains could withstand proces-

sors' attempts to withhold beef in order to drive up the wholesale price. The processors' only recourse was to pass on the undercharge by reducing the price they would pay for beef cattle. The plaintiff cattle producers, in turn, were forced to sell at the artificially depressed slaughterhouse price because fattened cattle become less valuable if they are not sold within three weeks of the time they reach choice grade. 600 F. 2d at 1154. Thus, under the allegations of the complaint, the producers' need to sell their cattle effectively insulated the middleman processors from any reduction in their ability to purchase beef cattle, even at artificially low prices. Therefore, the middlemen had no incentive to absorb any of the wholesale undercharge themselves. Because these highly inelastic short-term supply conditions made it simple to calculate the amount of the pass-through, the Fifth Circuit found the rationale of *Illinois Brick* inapplicable and held the plaintiffs had alleged the functional equivalent of a pre-existing cost-plus contract. 600 F. 2d at 1164-65.

The present case, however, includes most of the uncertainties and problems of proof that troubled the Court in *Illinois Brick*. The Hospital's demand for Wilhelm's services was limited by the competing bids: only by underselling its four competitors could Wilhelm secure the contract. Since the general contractor presumably did not know what its competitors would bid, it had an incentive to absorb part or all of the overcharge. This being so, we do not consider the relationship between Wilhelm and the Hospital the functional equivalent of a pre-existing contract. The *Beef Industry* case is distinguishable. *See Eastern Airlines, Inc.* v. *Atlantic Richfield Company,* 609 F. 2d 497, 498 (Tem. Emer. Ct. App. 1979). *Compare Obron* v. *Union Camp Corporation, supra,* 477 F. 2d 542 (6th Cir. 1973) (which allowed a passing-on defense where the middleman had sold for the defendant under what

amounted to a commission arrangement) *with Phillips* v. *Crown Central Petroleum Corp.*, 602 F. 2d 616, 633 (4th Cir. 1979), *cert. denied,* 100 S. Ct. 1021 (1980) (finding no cost-plus equivalent where gasoline retailers were forced to vary their prices in relation to fixed wholesale prices).

C

Finally, the Hospital argues there could have been a vertical conspiracy between the various general contractors and the defendants to fix the price of the mechanical work on the Wheeler Addition. Smith and Stewart were the only mechanical subcontractors to bid on the Addition. Their bids allegedly were rigged. The Hospital argues that any general contractor who knew or should have known the bids were rigged and who incorporated the rigged bids into its own bid calculations became a party to the conspiracy. Under the Hospital's theory, such a general contractor would be jointly and severally liable for the full amount of the overcharge, and the Hospital would not have to assert a pass-on theory to prove its damages.

The problem with this argument is that the Hospital has never pleaded the existence of a vertical conspiracy nor alleged facts sufficient to sustain such an allegation. Instead, the Hospital's complaints alleged two separate horizontal conspiracies, one among the general contractors and the other between Stewart and Smith. Only when the defendants moved for summary judgment under *Illinois Brick* did the Hospital move to consolidate the actions. The motion stated only that some of the general contractors computed their final bids by adding a percentage to the subcontractors' bids and that any general contractor who did so knowing the mechanical subcontract bids were rigged became a party to the illegality. The Hospital has never alleged that any of the general contractors knew the sub-

contractors' bids were rigged nor indicated what facts would have put the general contractors on notice of the defendants' illegal activities. In the absence of such allegations, the Hospital's vertical conspiracy argument impresses the court as a transparent attempt to evade the rule of *Illinois Brick*. *Cf. In re Beef Industry Antitrust Litigation, supra*, 600 F. 2d at 1161-63 (rejecting a similar belated attempt to argue the existence of a vertical conspiracy). Under the circumstances, we need not decide whether proof of knowledge and passing on, without actual agreement, would establish a vertical conspiracy nor whether such conspiracies are outside the rationale of *Illinois Brick*. *See Id.*

We have considered the Hospital's remaining arguments and conclude that they are without merit. Because *Illinois Brick* controls the result in this case, we do not reach the merits of the statute of limitations issue.

The judgment of the district court is affirmed.

## APPENDIX E

**JUDGMENT**—Filed August 29, 1980

Before: KENNEDY and JONES, Circuit Judges, and PHILLIPS, Senior Circuit Judge.

APPEAL from the United States District Court for the Western District of Kentucky.

THIS CAUSE came on to be heard on the record from the United States District Court for the Western District of Kentucky and was argued by counsel.

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be and the same is hereby affirmed.

It is further ordered that Defendants-appellees, Cross-appellants recover from Plaintiff-appellant, Cross-appellee the costs on appeal, as itemized below, and that execution therefor issue out of said District Court if necessary.

Entered by Order of the Court.

/s/ John P. Hehman, Clerk

A True Copy.

Attest:

/s/ Gary E. McCarthy, Deputy Clerk

Issued as Mandate: October 8, 1980 (Costs to be awarded to appellees, cross-appellants)

COSTS:

| | |
|---|---|
| Filing fee | $ 50.00 |
| Printing | $444.00 |
| Total | $494.00 |

## APPENDIX F

### ORDER DENYING PETITION FOR REHEARING—

Filed September 29, 1980

Before: KENNEDY and JONES, Circuit Judges, and PHILLIPS, Senior Circuit Judge.

Upon consideration, it is ORDERED that the petition for rehearing be and hereby is denied.

Entered by order of the court.

/s/ John P. Hehman, Clerk